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No. 92-611

In The

Supreme Court of the United States

October Term, 1992

OLD BRIDGE CHEMICALS, INC.,

Petitioner,

vs.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Do New Jersey's hazardous waste regulations constitute an impermissible burden upon interstate commerce, when those regulations do not discriminate against plaintiff's out-of-state chemical suppliers?

2. Do New Jersey's hazardous waste regulations violate the Resource Conservation and Recovery Act ("RCRA"), 42 *U.S.C.* § 6901 *et seq.*, when RCRA specifically allows states to adopt more stringent regulations than their federal counterparts?

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BRIEF IN OPPOSITION

The Respondent, New Jersey Department of Environmental Protection, respectfully requests that this Court deny the Petition for Certiorari seeking to review the opinion of the United States Court of Appeals for the Third Circuit reported at 965 *F.*2d 1287 (3d Cir. 1992).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 *U.S.C.* § 1254(1).

STATEMENT OF THE CASE

This case presents a challenge to the constitutionality and legality of New Jersey's hazardous waste regulations. Petitioner Old Bridge Chemicals, Inc. ("OBC") is a chemical manufacturing company based in Old Bridge, Middlesex County, New Jersey. It brought the within lawsuit for declaratory and injunctive relief against Respondent New Jersey Department of Environmental Protection[1] on or about June 26, 1990, alleging that New Jersey's hazardous waste regulations violate both the Commerce Clause of the United States Constitution, *U.S. Const.*, Art. I, § 8, cl. 3, and the Resource Conservation and Recovery Act ("RCRA"), 42 *U.S.C.* § 6901 *et seq.* The specific regulations in dispute are the Department's 1987 amendments to its hazardous waste regulations which, *inter alia*, established a new definition of "solid waste" under New Jersey law and set forth new standards for the recycling of hazardous waste.[2]

RCRA was enacted by Congress in 1976 "to protect human health and the environment" with respect to the generation, transportation and disposal of hazardous

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[1] Subsequent to the filing of this action, the responsibilities of the former NJDEP have been assumed by the New Jersey Department of Environmental Protection and Energy. To avoid confusion, Respondent shall continue to refer to itself as "NJDEP" or "the Department."

[2] The rule amendments in question were proposed on June 15, 1987, 19 *N.J.R.* 1035(a), and were adopted effective December 21, 1987, 19 *N.J.R.* 2426(a). All of *N.J.A.C.* 7:26, including the rules in question, was proposed for readoption on September 17, 1990 at 22 *N.J.R.* 2882(a). These rules were readopted effective October 25, 1990, 22 *N.J.R.* 3514(a).

waste. 42 *U.S.C.* § 6922. One of the principal features of RCRA was the establishment of a manifest system to provide for "cradle to grave" tracking of hazardous wastes in order to ensure that hazardous wastes are treated, stored and disposed of at properly permitted facilities. *Id.* Although RCRA sets a federally-mandated "floor" for hazardous waste management, below which no state hazardous waste management program may fall, the statute specifically reserves to the states the right to adopt hazardous waste management regulations that are more stringent than the minimum standards prescribed by RCRA. 42 *U.S.C.* § 6929.

In order for a substance to be considered a "hazardous waste" under both New Jersey and federal hazardous waste regulations, it must first be deemed a "solid waste." The portion of NJDEP's 1987 rule amendments which is most germane to this litigation is the amendment of the definition of "solid waste" to include recycled "by-products."[3] *N.J.A.C.* 7:26-1.6(b)5. Under federal RCRA regulations, the United States Environmental Protection Agency ("EPA") excludes from its definition of "solid waste" materials which "can be shown to be recycled by being . . . [u]sed or reused as effective substitutes for commercial products." 40 *C.F.R.* § 261.2(e)(1)(ii). NJDEP, on the other hand, takes the view that the nature of the material, as opposed to its use, should govern the

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[3] A "by-product" is defined in *N.J.A.C.* 7:26-1.4 as a material that is not one of the primary products of a production process and is not solely or separately produced by the production process. The term does not include a "co-product" as defined herein.

way the material should be handled. In brief, if a material is of a hazardous nature, whether or not it will be recycled, NJDEP requires that it be handled as hazardous waste in New Jersey in order to best protect the public health and safety during the transportation, storage, and treatment of the hazardous material. NJDEP's definition of "hazardous waste" reflects that philosophy.[4]

On January 11, 1990, NJDEP's Bureau of Hazardous Waste Regulation and Classification issued OBC a determination that certain raw materials used by OBC in its manufacturing processes were by-product solid wastes exhibiting hazardous waste characteristics and were thus considered to be "hazardous wastes" under New Jersey's hazardous waste regulations. OBC filed suit in federal district court seeking to enjoin NJDEP from enforcing the regulations in question and to obtain a declaratory judgment that the regulations violate the Commerce Clause of the United States Constitution and RCRA. OBC alleged that the raw materials in question are recycled materials

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[4] *N.J.A.C.* 7:26-1.4 defines "hazardous waste" as

> any solid waste or combination of solid waste, including toxic, corrosive, irritating, sensitizing, radioactive, biologically infectious, explosive or flammable solid waste, which poses a present or potential threat to human health, living organisms or the environment, provided that the solid waste is hazardous in accordance with the standards and procedures set forth at *N.J.A.C.* 7:26-8.

New Jersey's regulations are thus similar to federal regulations in this regard, as federal regulations also require that a substance must first fall within the definition of "solid waste" in order for it to be classified as a "hazardous waste." 40 *C.F.R.* § 261.3.

which would be exempt from federal regulation pursuant to 40 *C.F.R.* § 261.2(e)(1)(ii) and would thus not be considered a hazardous waste under RCRA. (Pb3). Under the federal RCRA program, Petitioner argued, shipments of such recyclable hazardous materials would not have to be made under a hazardous waste manifest because such materials would technically be excluded from the definition of "solid waste" (notwithstanding the fact that the hazardous nature of the materials is unaffected by their intended use). New Jersey, which has availed itself of the authority granted it by RCRA to adopt hazardous waste management regulations stricter than the federal model, 42 *U.S.C.* § 6929, does require that shipments of such hazardous recyclable materials to New Jersey be made under a hazardous waste manifest because NJDEP considers them to be hazardous wastes, whether disposed of or recycled.

OBC alleged that what it characterizes as the "regulatory anomalies" in New Jersey's hazardous waste regulations (namely, a more stringent definition of "solid waste" than that contained in the federal hazardous waste regulations) constituted an impermissible burden upon interstate commerce, thus rendering them invalid. The gist of Petitioner's Commerce Clause argument is its allegation that its out-of-state suppliers of the materials in question are withdrawing or threatening to withdraw as suppliers because they do not wish to have to handle their shipment of these hazardous materials in accordance with NJDEP regulations. (Pb5).

On January 31, 1991, NJDEP filed a motion for summary judgment on the grounds that, as a matter of law, NJDEP's hazardous waste regulations were not violative

of either the Commerce Clause or RCRA. On September 4, 1991, the Honorable Maryanne Trump Barry, U.S.D.J., signed an Order granting defendant's motion in its entirety. (Pa27).

OBC appealed to the Third Circuit Court of Appeals, which unanimously affirmed the district court's judgment by an Order dated June 10, 1992. (Pa3). In analyzing OBC's Commerce Clause challenge, the Third Circuit agreed with the district court that the appropriate standard of review was the balancing test enunciated by this Court in *Pike v. Bruce Church, Inc.*, 397 *U.S.* 137, 142 (1970). In applying the balancing test to the New Jersey regulations, which applied even-handedly to in-state and out-of-state chemical suppliers, the Third Circuit correctly concluded that the regulations did not impose an unconstitutional burden on interstate commerce. 965 *F.*2d at 1296. The Third Circuit further ruled that New Jersey's hazardous waste regulations did not violate nor undermine RCRA, which expressly grants states the power to promulgate regulations more stringent than the federally-prescribed minimum standards. *Id.* at 1296-1297; 42 *U.S.C.* § 6929. OBC filed a petition for rehearing to the Third Circuit, which was denied by an Order dated July 8, 1992. (Pa1).

ARGUMENT

POINT I

THE THIRD CIRCUIT'S DECISION UPHOLDING NEW JERSEY'S HAZARDOUS WASTE REGULATIONS IS ENTIRELY CONSISTENT WITH THIS COURT'S INTERPRETATION OF THE COMMERCE CLAUSE.

Petitioner contends that the Third Circuit misapplied this Court's decisions by failing to subject New Jersey's

hazardous waste regulations to a heightened scrutiny analysis. Contrary to Petitioner's assertions, however, the Third Circuit correctly applied the balancing test enunciated by this Court in *Pike v. Bruce Church, Inc.*, 397 *U.S.* 137, 142 (1970). The Third Circuit's decision contains a factually-sensitive determination which is entirely consistent with the relevant previous decisions of this Court, the Courts of Appeals for other circuits, and other state courts. Accordingly, OBC's petition for a writ of certiorari should be denied.

This Court has consistently held that the level of scrutiny that a court must give to a state regulation challenged under the Commerce Clause depends upon whether the alleged discrimination against interstate commerce is patent or merely incidental. *See, e.g., New Energy Co. of Indiana v. Limbach*, 486 *U.S.* 269, 273-274, 276 (1988); *American Trucking Associations, Inc. v. Scheiner*, 483 *U.S.* 266, 286 (1987); *City of Philadelphia v. New Jersey*, 437 *U.S.* 617, 624 (1978). When patent discrimination is involved, the regulation will be subject to heightened scrutiny, and a "virtually *per se* rule of invalidity" will be applied. *City of Philadelphia, supra*, 437 *U.S.* at 624. However, when a regulation serves a legitimate state interest, it will be invalidated only if its incidental burden upon interstate commerce is clearly excessive when weighed against the benefits it confers upon the state promulgating it. *Pike v. Bruce Church, supra*, 397 *U.S.* at 142.

In *City of Philadelphia, supra*, this Court articulated the competing concerns which are implicated by each of the standards of review:

> The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected . . . But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.* [437 *U.S.* at 623-624 (emphasis added; citations omitted).]

Contrary to OBC's assertions, the Third Circuit correctly articulated and applied the appropriate standard of judicial review to the unique facts of this case. Ironically, this is borne out by the following language from this Court's opinion in *Chemical Waste Management, Inc. v. Hunt*, 504 *U.S.* ___, ___, 112 *S.Ct.* 2009, 2015 *n.* 6 (1992) from which Petitioner quotes approvingly in support of its argument that heightened scrutiny should have been applied in this case:

> This narrow focus on the intended consequence of the disputed statute does not conform to our precedents, for "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose, see *Hunt v. Washington Apple Advertising Comm'n*, 432 *U.S.* 333, 352-353, 97 *S.Ct.* 2434, 53 *L.Ed.*2d 383 (1977), or discriminatory effect, see *Philadelphia v. New Jersey, supra.*" *Bacchus Imports, Ltd. v. Dias*, 468 *U.S.* 263, 270, 104 *S.Ct.*

> 3049 3054, 82 *L.Ed.*2d 200 (1984). The "virtually *per se* rule of invalidity," *Philadelphia v. New Jersey, supra,* 437 *U.S.* at 624, 98 *S.Ct.*, at 2535, applies "not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade." *Maine v. Taylor,* 477 *U.S.* 131, 148, *n.* 19, 106 *S.Ct.* 2440, 2453, *n.* 19, 91 *L.Ed.*2d 110 (1986).

However, OBC fails to note that the Third Circuit's holding below that heightened scrutiny is appropriate when reviewing "state actions that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity in areas of particular federal importance," 965 F.2d at 1291, is in total accord with the holdings of this Court in *Chemical Waste Management* and previous precedents.

The reason why the Third Circuit did not apply heightened scrutiny under the facts of this case is that the New Jersey regulations neither purposefully nor arbitrarily targeted out-of-state economic interests. New Jersey's hazardous waste regulations do not remotely constitute the type of economic protectionist measure that would be subject to a virtually *per se* rule of invalidity. In *Limbach, supra,* this Court defined such proscribed economic protectionism as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." 486 *U.S.* at 273-274. New Jersey's regulatory scheme is clearly not such a protectionist measure, as Petitioner concedes that the regulations equally burden in-state and out-of-state suppliers of recyclable by-products. (Pb13). As this Court recognized in *Minnesota v. Clover Leaf Creamery Co.,* 449 *U.S.* 456, 473 n.17,

(1978), "The existence of major in-state interests adversely affected by [an] Act is a powerful safeguard against legislative abuse."

Further, the Department has evinced no discriminatory attitude whatsoever toward out-of-state economic interests in promulgating these regulations. Rather, New Jersey's regulations are merely designed to confer a substantial environmental benefit upon its citizens. As NJDEP clearly set forth in its Social Impact and Environmental Impact statements accompanying the rule amendments when they first were proposed, the principal benefit to be derived from these more stringent regulations is a reduced potential for environmental and public health disasters caused by the mismanagement of hazardous recyclable materials.[5] [6]

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[5] As this Court has previously held, the objectives articulated by an administrative body should be assumed to be the actual purposes of a regulation. *Weinberger v. Weisenfeld*, 420 *U.S.* 636, 648 n.16 (1975); *Minnesota v. Clover Leaf Creamery, supra*, 449 *U.S.* at 463 n.7, 471, n.15.

[6] Social Impact

The proposed amendments clarify the definition of solid waste to specifically include hazardous materials which are recycled. By defining and clarifying the scope of regulation over hazardous waste recycling activities and by incorporating additional management requirements for these activities into the hazardous waste rules, the citizens of New Jersey will benefit from improved protection of the public health and the environment.

The Department's past experience with certain waste recyclers reveals a real and potential threat of mismanagement of hazardous wastes. These proposed rules further clarify which materials may be exempt

Nor is heightened scrutiny justified on the basis that New Jersey's hazardous waste regulations "undermine uniformity in areas of particular federal importance." The Third Circuit correctly noted that RCRA, by permitting states to adopt regulations more stringent than federally mandated minimum standards, "reveals a congressional intent that hazardous waste is not an area of *particular* federal importance requiring one uniform national system or plan of regulation." 965 *F.*2d at 1292 (emphasis in original); 42 *U.S.C.* § 6929. As the Third Circuit further observed, even were that not the case, New Jersey's use of EPA waste codes already familiar to the regulated community actually fosters the uniformity of codes

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from regulation. The proposed amendments will clarify the fact that the recyclers of non-exempt hazardous wastes will be governed by the full hazardous waste regulatory program.

On the other hand, the proposed amendments will clarify the Department's intent not to regulate certain nonhazardous recyclable materials. The proposed amendment will benefit the public in that nonhazardous material recycling, which reduces the waste stream and preserves scarce disposal capacity, will be fostered.

Environmental Impact

An environmental benefit will be derived from these amendments by clarifying the scope of the State's hazardous waste rules. Formerly, materials that were not "sometimes discarded" were exempt from regulation as hazardous wastes even though they may have exhibited hazardous characteristics. If improperly handled, these materials could cause environmental degradation. The proposed amendments will reduce the potential for mismanagement of recyclable hazardous waste materials. [19 *N.J.R.* at 1036-37].

because it immediately communicates the precise chemical nature of the hazardous waste under manifest." 965 *F.*2d at 1293. In addition, heightened scrutiny is inappropriate because Congress has not preempted the field of interstate waste management. *City of Philadelphia, supra,* 437 *U.S.* at 620 and n.4.

Petitioner also urges that this Court review the Third Circuit's decision because "[l]ower courts are divided on the appropriate standard of review when a challenged regulation is deemed to have a discriminatory effect without evidence of a discriminatory motive." (Pb14). An examination of the authority relied upon by Petitioner in support of its argument reveals that no such division exists.

For example, in *National Solid Wastes Management Association v. Alabama Department of Environmental Management,* 910 *F.*2d 713, 724-725 (11th Cir. 1990), *modified,* 924 *F.*2d 1001, *cert. denied,* 111 *S.Ct.* 2800 (1991), the Eleventh Circuit applied the *Pike* balancing test in analyzing Alabama's facially nondiscriminatory regulations which required state approval before a generator could dispose of its waste at an Alabama facility. Contrary to petitioner's assertions, the standard of review applied by the Eleventh Circuit was identical to that applied by the Third Circuit in this case;[7] the only difference between

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[7] The Eleventh Circuit's opinion also struck down an Alabama statute on Commerce Clause grounds after applying a heightened scrutiny analysis. 910 *F.*2d at 719-712. However, like *City of Philadelphia* and unlike the facts of this case, the Alabama statute distinguished among wastes based purely upon their origin. *Id.* at 720.

the two cases being that, on their facts, New Jersey's regulations survived under the *Pike* analysis, while Alabama's did not. Because balancing tests are inherently fact-sensitive, it is inevitable that different results will be obtained when courts apply the same analysis to varying fact patterns. There is thus no conflict among the Circuits which warrants this Court's review.

Neither do the state court cases relied upon by Petitioner support its argument that the states are in need of this Court's further guidance in interpreting the Commerce Clause. *Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 *So.*2d 1000 (Fla. 1988), *rev'd on other grounds*, 110 *S.Ct.* 2238 (1990), is merely another example of a state statutory scheme which did not survive the *Pike* test. In *Dayton Power & Light Co. v. Lindley*, 58 *Ohio St.*2d 465, ___, 391 *N.E.*2d 716, 721 (Ohio 1979), the Ohio Supreme Court relied upon this Court's holding in *City of Philadelphia, supra*, in striking down a tax measure which it found not to be even-handed, and which imposed more than a merely incidental burden upon interstate commerce. The reasoning employed by the Ohio court thus conflicts with neither this Court's precedents nor the Third Circuit's decision in this matter.

Having properly rejected Petitioner's argument that heightened scrutiny should be applied, the Third Circuit correctly affirmed the trial court's analysis under the *Pike* balancing test. The threshold inquiry under the *Pike* test is whether the challenged state action "affect[s] and burden[s] interstate commerce." 397 *U.S.* at 142. The Third Circuit correctly held that New Jersey's regulatory scheme did not burden interstate commerce, as it imposed no greater burden upon out-of-state companies

than upon New Jersey companies. Any New Jersey company which supplied the same hazardous materials to Petitioner would certainly have to comply with the same regulations. The economic injury which Petitioner alleges is precisely the opposite of the paradigm discrimination case, as Petitioner alleges that *its* local business is being harmed by the alleged withdrawal or threatened withdrawal of its out-of-state suppliers. Thus, as the Third Circuit and the district court correctly observed, the harm alleged by Petitioner was a burden on commerce, and not a discriminatory burden on interstate commerce. 965 *F.*2d at 1295.

Because Petitioner failed to meet the threshold requirement for application of the *Pike* test, the Third Circuit properly concluded its inquiry without engaging in an analysis of the putative local benefits of the challenged regulations. 965 *F.*2d at 1295. Even were that not the case, however, Petitioner would still have failed to satisfy the remaining portion of the *Pike* test.

To begin with, the practical economic effects complained of by OBC are not as onerous or dramatic as it would suggest. All that any of Petitioner's in-state or out-of-state suppliers are required to do is to ship certain hazardous materials to OBC in New Jersey under manifest. With respect to OBC's assertion that certain of its out-of-state suppliers are fearful of the threat of federal regulatory liability if they complied with New Jersey's hazardous waste code program (Pb5), such alleged fears are unjustified. It is not the manifesting or the hazardous waste code which imposes liability, but the inherently hazardous nature of the material itself. Just as the absence of a hazardous waste manifest does not render

hazardous material non-hazardous, use of a manifest does not make the material a hazardous waste. There are no federal prohibitions against handling solid wastes in accordance with state requirements which are more strict than the federal requirements. In fact, Congress, in enacting RCRA, contemplated states developing hazardous waste programs more stringent than federally-prescribed minimum standards, and explicitly permitted states to do so. 42 *U.S.C.* § 6929. That a federal-state partnership in the field of hazardous waste regulation is compatible with the RCRA program is further borne out by EPA's Form 8700-12, an EPA guidance document for those who handle regulated hazardous wastes, which designates a space on the form to list state-only regulated wastes and advises the regulated community that "[m]any States have requirements that vary from the Federal regulations [which] *may be more strict than the federal regulations by identifying additional wastes as hazardous.*" 965 F.2d at 1292 (emphasis added by the court).

Additionally, OBC misstates the law by asserting that compliance with New Jersey's regulatory scheme would run afoul of other federal regulations because New Jersey's use of RCRA "D" codes might cause companies in some instances to violate federal Department of Transportation ("USDOT") regulations, specifically 49 *C.F.R.* § 172.202(e), through use of improper USDOT "hazard class" designations. (Pb12-13). An examination of both the USDOT and EPA regulatory schemes reveals that this would not occur. NJDEP does not dispute that it would be a violation of 49 *C.F.R.* § 172.202(e) to use a USDOT hazard class (specified in 49 *C.F.R.* § 172.101) in the USDOT description portion of a Uniform Hazardous

Waste Manifest[8] if the material being shipped is not considered hazardous for transportation purposes and is described with an improper USDOT hazard class. However, New Jersey's regulations in no way require a company to use an improper hazard class designation in the USDOT description portion of a manifest. Further, as OBC consistently seeks to downplay, both Items J and 15 of the manifest permit a company to provide additional narrative information or descriptions regarding the material under manifest to further reduce any possibility of an erroneous citation.[9] (Pb7 *n*.3). Simply stated, New Jersey's hazardous waste regulations can in no way be construed to require a company to incur federal liability by filling out a Uniform Hazardous Waste Manifest. The information which OBC is so concerned about providing is not part of any of the federally mandated information requested by the manifest form; rather, it need appear only in the portion of the manifest form reserved for State hazardous waste programs.[10]

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[8] The Uniform Hazardous Waste Manifest and instructions are set forth as an Appendix to Part 262 of 40 *C.F.R.*

[9] For example, Items J and 15 of the manifest form provide a convenient opportunity to simply state that the waste is a "New Jersey special waste not subject to federal RCRA requirements."

[10] As set forth in the EPA's instructions accompanying the Uniform Hazardous Waste Manifest (which are contained in an Appendix to Part 262 of 40 *C.F.R.*):

> Items A-K are not required by Federal regulations for intra- or interstate transportation. However, States may require generators and owners or operators of treatment, storage, or disposal facilities to complete some or all of items A-K as part of State manifest

As the Third Circuit noted, New Jersey's hazardous waste code system is relatively simple and straightforward. It uses waste codes familiar to the regulated community which also serve to immediately communicate the essential chemical nature of the material. Petitioner concedes that some of the raw materials which it uses in its manufacturing process are hazardous, 965 *F.*2d at 1289; the mere fact that these materials may be destined for recycling does nothing to change the inherent chemical nature of, and hazards posed by, these materials. New Jersey's regulatory program seeks to protect its citizenry from the hazards posed by these materials by keeping a watchful eye over their handling, whether the source of the hazardous material is from out-of-state or from in-state, and whether recycled or disposed of. In that respect, New Jersey's regulatory scheme provides more accurate tracking of hazardous substances, and affords even greater protections against the dangers of mismanagement of hazardous wastes, than federal regulations.

The legal standards applied by the Third Circuit to the facts of this case are entirely consistent with this Court's well-settled precedents, and are in accord with the decisions of the Courts of Appeals and other state courts. Accordingly, Petitioner's petition for a writ of certiorari should be denied.

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reporting requirements. Generators and owners and operators of treatment, storage, or disposal facilities are advised to contact State officials for guidance on completing the shaded areas of the Manifest [Items A-K].

POINT II

NEW JERSEY'S HAZARDOUS WASTE REGULATIONS DO NOT VIOLATE THE FEDERAL RESOURCE CONSERVATION AND RECOVERY ACT.

Petitioner asserts that New Jersey's hazardous waste regulations "undermine the operational integrity" of the federal regulatory scheme of hazardous waste management created by Congress in enacting RCRA. (Pb6). As the Third Circuit correctly held below, after examining the statute and its underlying legislative history, the regulations challenged by OBC "are consistent with the clear language and intent of RCRA." 965 *F.*2d at 1296.

As Petitioner concedes, RCRA expressly grants states the latitude to adopt regulations more stringent than RCRA's federally-mandated minimum standards. (Pb7). However, OBC imputes limitations upon a state's regulatory discretion which are nowhere contained in the clear and unambiguous language of RCRA, which provides in pertinent part that

> Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations. Nothing in this chapter (or in any regulation adopted under this chapter) shall be construed to prohibit any State from requiring that the State be provided with a copy of each manifest used in connection with hazardous waste which is generated within that State or transported to a treatment, storage, or disposal facility within that State. [42 *U.S.C.* § 6929.]

Even assuming *arguendo* that Petitioner were correct in implying that RCRA's "savings clause" merely pertains to a state's authority to regulate "issues of particularly local concern" (Pb7), it is hard to imagine an issue of more vital local concern than safeguarding against the risk of mismanagement of hazardous materials.

OBC's argument that New Jersey's more stringent regulations threaten the uniform regulatory scheme established by RCRA is entirely without merit. As the Third Circuit correctly observed, New Jersey's "use of the RCRA codes [to describe the chemical nature of the recyclable by-products] actually enhances the uniformity of the federal codes because the New Jersey-only wastes contain the same chemical composition and inherent dangers as the corresponding RCRA wastes." 965 *F.*2d at 1296-1297.

The Third Circuit's holding on this issue comports with the express language of RCRA and its legislative history, thus making further review by this Court unnecessary. Accordingly, OBC's petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, OBC's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: November 5, 1992